



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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Francis X. Lyons, Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3507

Dear Mr. Lyons:

There is considerable interest in Wisconsin among a broad spectrum of people who would like to see a more streamlined approach for dealing with hazardous waste issues at clean up and redevelopment projects. As a result, the Wisconsin Department of Natural Resources has been meeting with an advisory group (the "Brownfields Study Group") to receive their input on this issue. While we already have some significant agreements in place with Region 5 on this issue, we and our customers need further flexibility and innovation to make these site clean-ups consistent with all the other clean-up and redevelopment projects in Wisconsin.

We believe that this issue is well suited for a Regulatory Innovation Agreement in accordance with the "Joint EPA/State Agreement to Pursue Regulatory Innovation." I am writing to inform you that we are drafting a proposal for accomplishing this objective. I'd also like to emphasize the importance of this proposal to our external customers and to this agency. This will be of highest priority for our managers, and I hope that it will be assigned a high level of importance by Region 5 management as well.

Enclosed is a set of drafting instructions that my staff has developed. These instructions will be used to prepare the proposal. We hope to have final proposal ready for your review by the end of May, but we also recognize a need for dialogue and feedback well before the drafting is complete. We'd like to begin that dialogue as soon as possible. Jerri Anne Garl and Lynda Wiese are our respective designated lead agency contacts for Regulatory Innovation Proposals. Your Division Directors, our Bureau Directors and other members of the management teams should also be heavily involved. I am requesting that Jerri Anne and Lynda coordinate a kick-off meeting to begin some of the conceptual discussions as soon as possible.

Thank you for your attention to this issue.

Sincerely

George E. Meyer
Secretary

cc: Jerri Anne Garl - EPA
Robert Springer – EPA
William Munro - EPA
Jay Hochmuth – WDNR
Lynda Wiese – WDNR
Sue Bangert – WDNR
Mark Giesfeldt – WDNR
Mary Jo Kopecky – WDNR
Mark Gordon – WDNR
Kevin Kessler - WDNR

DRAFTING INSTRUCTIONS FOR HAZARDOUS WASTE REMEDIATION PROPOSAL

Background

Over the last 6 months a significant amount of time and effort has been spent discussing a number of issues regarding remediation of sites that have contaminated media defined as hazardous waste. While most were resolved, there were three major issues where consensus could not be reached. The unresolved issues were presented to the Air and Waste Management Team for resolution on December 17, 1999. Due to the complexity of the issues and the limited time available it was not possible to resolve the issues at that meeting. However, a process was developed for reaching resolution. The major component of the proposed process is the preparation of a comprehensive plan for dealing with cleanup of sites contaminated with hazardous waste. The proposal will be presented to the Brownfields Study Group and EPA for concurrence.

The RR Strategic Direction Report (September, 1995) and subsequent guidance (5/20/97 memo) gave the RR Program responsibility for hazardous waste cleanups. These documents also indicated that the NR 700 rule series should be uniformly applied to all environmental remediation actions. However, since that time there have been different interpretations on the extent to which the NR 700 series is intended to supplant vs. supplement the NR 600 series for hazardous waste remediation projects. These differing interpretations have resulted in the inconsistent handling of these types of projects. In addition, the Waste Management Program has raised concerns regarding program integrity and applicability of federal guidance and policy to cleanups where hazardous waste is involved.

The RR Strategic Direction Report goes on to say that: “the Department should aggressively seek concurrence with a cultural change in the relationship it has with EPA to redefine state-federal partnership and seek EPA’s assistance in leveraging other federal agencies with the capacity to assist in converting contaminated lands to beneficial use.” The instructions listed below follow this recommendation by specifying that the comprehensive plan be drafted to uniformly utilize the NR 700 series for all cleanups involving hazardous waste. The instructions also identify that a provision be included for expanding the liability exemptions that apply to lenders and local units of government under RCRA, similar to provisions in the state spill law and Federal Superfund law. Finally, the instructions identify those provisions for ensuring consistent case close-out decisions and the role of enforcement under NR 600 should be included.

Drafting Instructions

The spill law (s. 292.11, stats.) and the NR 700 series shall form the basis for developing a comprehensive plan for addressing sites that have contaminated media defined as hazardous waste. State and federal hazardous waste law will be used as the basis for dealing with situations where voluntary cleanups are not accomplished in a timely fashion. The Plan will be submitted to EPA for approval under the Innovative Regulatory Agreement between EPA and ECOS. That Plan will include any needed revisions to the NR 700 series, the NR 600 series, and any other related DNR rules. The Plan will also include the RR Program position on the 3 issues discussed at the December 17, 1999 Air and Waste Management Team meeting. These include: 1) Utilizing EPA’s Area of Contamination (AOC) policy such that waste being managed within an AOC would not constitute active management of a hazardous waste. 2) Allowing full use of the NR 700 series and associated state guidance when selecting remedies

and closing out sites contaminated with hazardous waste. This would include use of institutional controls and natural attenuation. 3) Allowing in-situ treatment of soil and groundwater contaminated by a listed or characteristic waste, after the waste is defined as hazardous, without a hazardous waste treatment license or variance. All other issues that were identified and resolved as part of the solid waste streamlining team discussions are to be included as agreed between the Waste Management and RR Programs.

The Plan needs to address the process (i.e. rule revisions, guidance development, training, etc.) that will be used to ensure consistent decision making in these areas. The Plan will include proposed guidance and any necessary rules to ensure consistent decision making for sites covered by the proposal. Areas to be covered at a minimum include: 1) need for and procedures for NR 600 variances; 2) consistency in determining whether timely and satisfactory cleanup under NR 700 is occurring and defining when NR 600 requirements will be invoked; and 3) identifying the role of enforcement and the shift from voluntary cleanup under NR 700, and those that are not voluntary, or require enforcement activities under NR 600. The existing draft hazardous waste variance guidance that has been under development for quite some time shall be part of the Plan to ensure consistency. The draft guidance may be modified to reflect these drafting instructions with respect to the three issues that have been in dispute.

Another issue that needs to be addressed is the consistent management of petroleum contaminated media. This situation first became an issue when EPA promulgated the toxicity characteristic (TC) rule and concluded that media contaminated with a release of petroleum from federally regulated underground storage tanks are deferred from complying with the hazardous waste rules while media contaminated with releases of petroleum from above ground storage tanks (AST's) and spills are not exempt. In 1992, EPA issued a draft rule that expanded the deferral to all petroleum releases, but subsequently withdrew the rule when they decided to address the issue during development of the HWIR-Media rule. Unfortunately, the Media rule that was promulgated in November, 1998 was significantly reduced in scope from what was originally envisioned and as result it did not address how media contaminated with releases from AST's or spills should be managed. Therefore, this Plan should identify a process that delineates how all petroleum contaminated media will be managed consistent with the NR 700 series.

In addition to the provisions listed above, the Plan should also include a specific proposal for incorporating existing lender and local government liability exemptions under the state spill law and CERCLA to sites with RCRA implications. This would apply to any facility that ever managed or notified as managing hazardous waste including existing treatment, storage and disposal (TSD) facilities. The Plan should seek concurrence that routine lender operations such as normal banking activities, acquisition of property through foreclosures, removal of equipment or fixtures, and inspection of properties would not trigger RCRA liability. For local governments (LGU's), the Plan should seek EPA's concurrence that LGU's acquiring property involuntarily (i.e. slum clearance, blight elimination, condemnation, eminent domain, escheat or tax foreclosure) would not be considered an owner/operator under RCRA. Both lenders and LGU's would need to comply with the criteria included in the spill law such as allowing access to the property and not taking any actions that would cause or exasperate a release. The intent of these provisions is to encourage remediation and redevelopment of RCRA sites in a manner consistent with what is allowed under CERCLA and the state spill law.

As part of developing the Plan, consideration should be given to whether any of the components identified above would qualify as an EPA "RCRA/Brownfields Pilot Project". EPA's guidance should be evaluated to determine whether it would be advantageous to submit a pilot project proposal in parallel with the Regulatory Innovation Proposal. If it is determined that a RCRA/Brownfields Pilot Project proposal should be submitted, the comprehensive plan described above will still be submitted to EPA as a Regulatory Innovation proposal.

Summary

A draft Plan addressing the instructions included above should be completed by March 31, 2000. At that point, the draft will be shared with the Brownfields Study Group and EPA for their review and feedback. The Plan should be a stand-alone document that references or incorporates all of the major documents utilized by the RR Program to implement the investigation and remediation of contaminated sites. Examples include: ch. 292, stats., NR 700 series, NR 140, Natural Attenuation guidance, institutional controls guidance, soil cleanup standards guidance, NR 140 implementation guidance, PAH soil cleanup guidance, hazardous waste variance guidance, and other documents as appropriate. After the feedback is evaluated, the Plan will be updated and submitted to EPA for approval. Once EPA approves the Plan, the Department will initiate any needed rulemaking called for in the Plan. While rulemaking is pending, guidance will be issued to staff for implementing the Plan. It is anticipated that guidance will be issued in September, 2000.